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6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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11 RIGHTHAVEN LLC, a Nevada limited-
liability company,
12
13 Plaintiff,
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15 v.
16 DEMOCRATIC UNDERGROUND, LLC, a
District of Columbia limited-liability
17 company; and DAVID ALLEN, an individual,
18
19 Defendants.

20 DEMOCRATIC UNDERGROUND, LLC, a
District of Columbia limited-liability
21 company,
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23 Counterclaimant,
24
25 v.
26 RIGHTHAVEN LLC, a Nevada limited-
liability company; and STEPHENS MEDIA
27 LLC, a Nevada limited-liability company,
28
Counterdefendants.

Case No.: 2:10-cv-01356-RLH-GWF

**RIGHTHAVEN LLC’S MOTION FOR
RECONSIDERATION OF MARCH 9,
2011 ORDER GRANTING
DEFENDANTS’ MOTION FOR LEAVE
TO FILE SUPPLEMENTAL
MEMORANDUM OR,
ALTERNATIVELY, APPLICATION FOR
BRIEFING SCHEDULE TO ADDRESS
SUPPLEMENTAL BRIEF**

1 Righthaven LLC (“Righthaven”) hereby moves for reconsideration of the Court’s March
2 9, 2011 Order (Doc. # 74) granting Underground, LLC’s (“Democratic Underground”) and
3 David Allen’s (collectively referred to herein as “Defendants”) Motion for Leave to File
4 Supplemental Memorandum Addressing Recently Produced Evidence Relating to Pending
5 Motions (the “Motion for Leave”). (Doc. # 72.) Alternatively, Righthaven hereby asks the Court
6 to enter a briefing schedule that grants sufficient time for Righthaven to address the issues
7 presented in Defendants’ supplemental brief. Righthaven requests a minimum of twenty-one
8 (21) days to respond to the supplemental brief should reconsideration be denied.

9 This submission is based on the pleadings and papers on file in this action, any oral
10 argument this Court may allow, and any other matter upon which this Court takes notice.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. INTRODUCTION

13 **A. *Basis For Reconsideration or, Alternatively, Application For Briefing Schedule.***

14 Righthaven asks the Court to reconsider its March 9, 2011 Order (Doc. # 74), which
15 granted Defendants Motion for Leave. Defendants filed their Motion for Leave on Friday,
16 March 4, 2011. (Doc. # 72.) Righthaven had prepared its response to the Motion for Leave and
17 was prepared to electronically submit it to the Court, but in the interim the Motion for Leave was
18 granted. Based on the Court’s action, which granted the Motion for Leave after only two full
19 judicial days from its filing, Righthaven was not provided with a sufficient opportunity to present
20 its response for consideration. Accordingly, Righthaven submits its response to the Motion for
21 Leave in the form of this motion for reconsideration. Alternatively, Righthaven asks the Court to
22 enter a briefing schedule so that it can substantively respond to the issues raised in Defendants’
23 supplemental brief. Righthaven proposes that its response date be set no less than twenty-one
24 (21) days from the date the Court takes action on this request for reconsideration.

25 **B. *Defendants’ Motion For Leave Should be Denied on Reconsideration.***

26 Defendants’ Motion for Leave is just the latest evidence of their litigation overkill and
27 unfettered refusal to allow Righthaven to take the rather reasonable response of voluntarily
28 dismissing its Complaint with prejudice given an adverse fair use decision by another judge in

1 this judicial district in a case involving the unauthorized replication of less than the entirety of a
2 copyrighted work.¹ In this regard, Defendants refuse to take “yes” for an answer.

3 In the face of Righthaven’s perfectly understandable and reasonable approach of seeking
4 to voluntarily dismiss its Complaint with prejudice, which would result in Defendants obtaining
5 a final judgment on the merits on the infringement allegations at-issue in this case, Defendants
6 have elected to needlessly increase the burden on this Court and its staff and to increase the
7 litigation costs incurred by the parties by escalating the litigiousness of the action. Righthaven
8 contends that this is precisely Defendants’ desired effect in this case – to drive up their attorneys’
9 fees and costs in an attempt to burden Righthaven with an astronomical fee award. Defendants’
10 litigation conduct clearly supports this conclusion. For instance, Democratic Underground filed
11 a completely unnecessary counterclaim (Doc. # 13), which seeks the same result it would obtain
12 through Righthaven’s dismissal with prejudice of its Complaint – a final adjudication on the
13 merits foreclosing the threat of re-litigation on the copyright infringement claim. Democratic
14 Underground’s entirely redundant counterclaim also needlessly brought Stephens Media, LLC
15 (“Stephens Media”) into this case as a third-party defendant, which has provided Democratic
16 Underground with another party to target in its efforts to drive up attorneys’ fees.

17 Defendants’ refusal to accept a final adjudication on the merits in their favor is evident in
18 their motion practice before this Court, which now includes their Motion for Leave. As a further
19 example, when presented with Righthaven’s motion to voluntarily dismiss its Complaint with
20 prejudice (Doc. # 36), Defendants strenuously opposed it (Doc. # 44). Defendants, however, did
21 not stop with their response in opposition. Rather, Defendants responded by filing a counter-
22 motion for summary judgment (Doc. #45), which, if granted, would also result in them obtaining
23 the exact relief sought in Democratic Underground’s counterclaim – a finding of non-
24 infringement. Now, despite these pending motions, either of which if granted would result in a
25 final judgment on the merits in their favor, Defendants have moved the Court for leave to file a

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27 ¹ The decision referred to was reached by Judge Hicks in *Righthaven LLC v. Realty One Group, Inc.*, (D. Nev.) 2:10-cv-1036-LRH-PAL. (Doc. # 17, 24.) On February 11, 2011, Righthaven
28 appealed Judge Hicks’ relevant orders and the resulting judgment to the United States Court of Appeals for the Ninth Circuit. (Doc. # 26.)

1 supplemental memorandum that they contend further demonstrates the viability of their
2 counterclaim. (Doc. # 72 at 1.)

3 Unfortunately, Defendants' litigation tactics are just the latest example of their tireless
4 efforts to drive up the attorneys' fees incurred in this case, which has not been limited to
5 unnecessary motion practice. Defendants' discovery efforts are another area in which they have
6 attempted to drive up litigation costs. For instance, Defendants held a meet and confer
7 conference consisting of two lawyers from Fenwick & West LLP, one lawyer from the
8 Electronic Frontier Foundation and local counsel – a total of four lawyers – for the purpose of
9 discussing Righthaven supplementing its initial disclosures to name company personnel. While
10 this may seem somewhat reasonable, albeit litigation overkill, the aura of reasonableness quickly
11 disappears when it is revealed that Defendants' own initial disclosures listed every Righthaven
12 employee then employed by the company. Defendants' scorched earth litigation tactics are
13 further evidenced by the voluminous written discovery requests propounded on both Righthaven
14 and Stephens Media in this action. These requests have included such blatantly objectionable
15 topics as requesting production of all statements from Righthaven's bank or other financial
16 institution. Righthaven's, and for that matter Stephen Media's, attempt to rightfully preserve and
17 protect its rights from such intrusive and impermissible discovery efforts has only resulted in the
18 parties unnecessarily incurring more attorneys' fees, which appears to be Defendants' goal.

19 Righthaven asks the Court to place a proverbial tourniquet on the bleeding of attorneys'
20 fees in this case by denying Defendants' request for leave to file a supplemental memorandum
21 upon reconsideration. In this vein, Righthaven asserts that Defendants' proposed filing is merely
22 another futile attempt to convince this Court that their redundant and unnecessary counterclaim
23 somehow warrants adjudication even if summary judgment is entered in their favor or if
24 Righthaven is permitted to voluntarily dismiss its Complaint with prejudice. While Defendants
25 further contend their supplemental memorandum is germane to their motion for summary
26 judgment and to Righthaven's motion for voluntary dismissal with prejudice, their arguments in
27 these regards are less than credible. Accordingly, after reconsideration, the Motion for Leave
28 should be denied.

1 **II. ARGUMENT**

2 Righthaven remains ready, willing and able to substantively address each of Defendants'
3 arguments raised in the proposed supplemental brief should the Court deny reconsideration,
4 which includes an extensive examination of the validity and propriety of Righthaven's
5 contractual relationship with Stephens Media. That said, an overview of the stated purpose
6 underlying the alleged necessity for filing the proposed supplemental brief demonstrates that
7 granting leave to file it is unwarranted.

8 ***A. The "Newly Produced Evidence" Does Not Justify The Counterclaim Surviving***
9 ***Dismissal.***

10 Simply stated, Defendants' defense of Righthaven's infringement allegations, which
11 include their affirmative defenses and their pending cross-motion for summary judgment, is
12 designed to result in a final judgment of non-infringement. Democratic Underground's
13 counterclaim seeks the sole relief of a non-infringement finding. (Doc. # 13 at 24-25.)

14 While Democratic Underground has argued, and now has renewed the argument based on
15 the "newly discovered evidence", that Stephens Media is a real party-in-interest, Stephens Media
16 has agreed to be bound by the Court permitting Righthaven to voluntarily dismiss its Complaint
17 with prejudice. In fact, issue preclusion (*res judicata*) principles necessarily support such a
18 conclusion whether Stephens Media made this concession or not. *See Dean v. Riser*, 240 F.3d
19 505, 510 n.1 (5th Cir. 2001). Similarly, there is simply no need for Democratic Underground's
20 counterclaim to survive should the Court grant its pending cross-motion for summary judgment
21 because a final adjudication of non-infringement would result. As such, leave to amend to
22 permit Defendants to argue further on the viability of their counterclaim is completely
23 unwarranted given its required dismissal if Righthaven's motion to voluntarily withdraw its
24 Complaint is granted or if Defendants' cross-motion for summary judgment is granted.
25 Accordingly, the Court should reconsider its decision to grant the Motion for Leave.

1 **B. The “Newly Discovered Evidence” Does Not Substantiate The Objective**
2 **Unreasonableness of Righthaven’s Claims.**

3 While Defendants argue that the “newly discovered evidence” substantiates the objective
4 unreasonableness of Righthaven’s claims, this conclusion is completely unjustified. In fact, it is
5 merely an attempt by Defendants to allude to some tangential relevance to the pending motion
6 for voluntary dismissal. This fact is clearly evident through the seven lines of argument
7 dedicated to this issue.

8 Simply put, Defendants are grasping at straws by trying to draw the Court’s attention to
9 an issue that has previously been litigated two times in this district. Decisions rendered in both
10 *Righthaven LLC v. Dr. Shezad Malik Law Firm, P.C.*, 2010 WL 3522372 (D. Nev. Sept. 2,
11 2010)(Hunt, C.J.) and *Righthaven LLC v. Majorwager.com, Inc.*, 2010 WL 4386499 (D. Nev.
12 Oct. 28, 2010)(Navarro, J.) rejected challenges to Righthaven’s standing to bring copyright
13 infringement actions based on its assignment of rights by Stephens Media in view of the decision
14 in *Silvers v. Sony Pictures Entm’t Inc.*, 402 F.3d 881 (9th Cir. 2005). Defendants contend the
15 “newly discovered evidence” will alter these results. Righthaven is confident it will not. If leave
16 is granted to file the supplemental memorandum, Righthaven intends to fully expose the readily
17 apparent flaws presented in Defendants’ arguments that would completely eviscerate countless
18 years of licensing and related transactions throughout the country.

19 The lack of merit underlying Defendants’ arguments aside, there is simply no basis to
20 conclude the “newly discovered evidence” demonstrates the objective unreasonableness of
21 Righthaven’s claims. Righthaven submits that the manner in which the “newly discovered
22 evidence” was drafted accounted for *Silvers* and any other relevant legal authorities. In short,
23 the “newly discovered evidence” does not support a finding that Righthaven’s claims were
24 objectively unreasonable. Accordingly, the Court should deny the Motion for Leave after
25 reconsideration.

1 ***C. The “Newly Discovered Evidence” Does Not Substantiate That Righthaven Faces***
2 ***No Possible Market Harm Through Defendants’ Use.***

3 Defendants’ final attempt at demonstrating the relevance of the “newly discovered
4 evidence” is by arguing that such evidence demonstrates that Righthaven faces no possible
5 market harm under the fourth fair use factor. Once again, Defendants are wrong.

6 To begin with, Righthaven has demonstrated in its response to Defendants’ cross-motion that a
7 presumption of market harm should be applied given the commercial nature of the infringement
8 at-issue. If such a presumption were applied, Defendants’ reliance on the “newly discovered
9 evidence” would be of marginal benefit. Moreover, Defendants summarily assert without legal
10 support that the fourth fair use analysis factor is directed to Righthaven’s market harm.

11 Righthaven believes, given the nature of the assignment at-issue as it applied to past claims for
12 infringement, that the proper analysis would be directed toward the market harm suffered by the
13 holder of the Work at the time the infringement occurred. If this is the correct inquiry, then the
14 “newly discovered evidence” does not support Defendants’ lack of market harm theory.

15 Defendants’ contention that the “newly discovered evidence” is highly probative of the mark
16 harm inquiry under the fourth fair use analysis factor is misplaced and it should not serve as
17 basis for granting leave to file the supplemental brief. Accordingly, the Court should deny the
18 Motion for Leave upon reconsideration.

19 **III. CONCLUSION**

20 For the foregoing reasons, Righthaven respectfully requests the Court deny Defendants’
21 Motion for Leave upon reconsideration.

22 Should the Court grant Defendants’ Motion for Leave, Righthaven requests the Court
23 grant it ample opportunity to effectively address the issues raised in the proposed supplemental
24 brief. Righthaven estimates that it will take no less than twenty-one (21) calendar days
25 following disposition of this request for reconsideration to prepare its substantive response to the
26 proposed supplemental brief given the numerous arguments it anticipates raising in response.

27 Accordingly, Righthaven requests the Court enter a briefing schedule sufficient to permit
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1 Righthaven such time to respond to the proposed supplemental brief if the March 9, 2011 Order
2 granting the Motion for Leave is left to stand.

3 Dated this 9th day of March, 2011.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 9th day of March, 2011, I caused the foregoing document to be served by the Court's CM/ECF system.

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